International Association of Heat and Frost Insulators and Asbestos Workers Local No. 53 (Insul-Contractors, Inc.) *and* Betty Ruth Turner. Case 15-CB-2401

July 15, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On March 9, 1982, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a memorandum in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge drew an adverse inference from Respondent's failure to produce certain records in support of its defense that its referral practices had changed prior to the alleged discriminatory referral. While Respondent's refusal to comply with the General Counsel's subpoena served to highlight the absence of such documentary evidence from the record, the issuance of the subpoena and the refusal to comply therewith is not the basis for an adverse inference herein. The basis for the inference rests on Respondent's failure to produce records containing evidence peculiarly within its knowledge in support of its defense in the face of evidence of the General Counsel that a practice had been in effect, and further evidence that the practice continued in effect beyond the date of the alleged discriminatory referral. Based on the above rationale, we find that the Administrative Law Judge appropriately drew an adverse inference from Respondent's failure to produce its records. E.g., *St. Regis Paper Company*, 247 NLRB 745 (1980); *Grandee Beer Distributors, Inc.*, 247 NLRB 1280, 1284 (1980).

In his Decision, at fn. 27, the Administrative Law Judge speculated on possible benefits had the General Counsel used an investigative subpeona prior to issuance of the complaint herein. We find it unnecessary to consider whether the use of an investigative subpeona was called for in the circumstances of this case, and unnecessary to speculate on the results its use could have engendered.

We note the apparent typographical error in the first sentence of the Administrative Law Judge's Decision. The hearing herein occurred on January 13, 1982.

[2] In the section of his Decision entitled "The Remedy," the Administrative Law Judge appropriately found that, absent the discrimination against Turner, she would have been referred to the January 7, 1981, job at no less than $7.605 per hour, instead of the $5.85-per-hour rate at which she was referred. A make-whole remedy for Turner's loss of earnings throughout the period of time she was employed by ICI at the Wyandotte job would include, therefore, the difference between her actual referral rate and a minimum of $7.605 per hour. Accordingly, in the circumstances of this case, where the issue was referral at a discriminatorily low rate of pay and there is no issue of a backpay remedy resulting from cessation of employment status, the amount of backpay may more appropriately be determined without quarterly computation as in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and the concept of "high interim earnings somewhere during the calendar quarter [as an] offset," as theorized by the Administrative Law Judge, is inapplicable. See *Ogle Protection Service, Inc.*, 183 NLRB 682, 683 (1970).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, International Association of Heat and Frost Insulators and Asbestos Workers Local No. 53, Baton Rouge, Louisiana, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: This case was heard before me in Baton Rouge, Louisiana, on January 13, 1981, pursuant to a complaint issued February 27, 1981, by the General Counsel of the National Labor Relations Board through the Regional Director for Region 15 of the Board. The complaint is based on a charge filed by Betty Ruth Turner (Turner or the Charging Party), an individual, on January 5, 1981, and amended January 21, 1981, against International Association of Heat and Frost Insulators and Asbestos Workers Local No. 53 (Local 53, the Union, or Respondent).[1]

In the complaint the General Counsel alleges that Respondent violated Section 8(b)(1)(A) of the Act on and after October 14, 1980,[2] by refusing to accept and process a qrievance of Turner relatinq to a reduction in her hourly pay, by threatening Turner on November 28 with refusal to refer her at all, or at the lowest possible wage rate, and by discriminatorily referring Turner on or about January 7, 1981, at the lowest contractual wage rate.

By its answer, Local 53 admits certain basic allegations, but denies that it has violated the Act in any manner.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Anco Insulations, Inc. (herein called Anco), is a Louisiana corporation engaged in business as an industrial in-

[1] *Sua sponte*, I have amended the caption to add the name of the contractor to whom Charging Party Turner was referred at an allegedly unlawfully low wage rate on January 7, 1981.

[2] All dates are for 1980, unless otherwise indicated.

sulation contractor at various jobsites including the jobsite of Bechtel Corporation in Convent, Louisiana. During the past 12 months, a representative period, Anco, in the course and conduct of its business operations, purchased supplies and materials valued in excess of $50,000, which were shipped directly to it from points located outside the State of Louisiana and/or received from Bechtel Corporation in excess of $50,000 for services performed in connection with its business operations in Convent, Louisiana.

Insul-Contractors, Inc. (herein called ICI), is a Louisiana corporation engaged in business as an industrial insulation contractor at various jobsites including the jobsite of Wyandotte Chemical Company in Geismar, Louisiana. During the past 12 months, a representative period, ICI, in the course and conduct of its business operations, purchased supplies and materials valued in excess of $50,000, which were shipped directly to it from points located outside the State of Louisiana.

Respondent admits, and I find, that Anco and ICI are employers within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 53 is, and has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Principal Issues*

Did Respondent fail to represent Betty Ruth Turner fairly concerning her October pay reduction grievance? Did Respondent, through Business Agent Cecil W. King, threaten Turner on November 28 in The Rack lounge by telling her that he would not refer her from the hall again, and that, if he did refer her, it would be at the lowest contractual wage rate? If King made such a threat, did Local 53 implement it?

My conclusions regarding these questions are: no, yes, and yes.

B. *Origin of the Conflict*

1. Referrals at inflated wage rates

Under contractual agreement with industry contractors in the southeastern Louisiana area, Local 53 operates an exclusive hiring hall for various employers needing employees to perform insulation-asbestos work. Two collective-bargaining agreements are utilized. One (the blue book) is for construction work, and the second (the orange book) is for maintenance work.[3]

It appears that for some time, at least during most of 1980, the demand for employees from the Local 53 hiring hall was good. Under such circumstances, a practice arose whereby Local 53 would refer employees at rates higher than their hours of experience warranted under the contracts.[4] Local 53 Business Agent Cecil W. King and his secretary, Joyce M. Palmour, explained that they wanted to obtain as much pay as they could for employees referred and did so while business was good. As mechanic Larry J. Ourso, Sr., testified, around January through February 1981 the journeymen began to complain. The practice apparently ceased around February through April 1981.

As the record reflects, the pay rates at which improvers (permit people who generally work as helpers) were referred could be erratic.[5] Palmour testified that it was not until February 1981 that the Baton Rouge office of Local 53 acquired a full set of employment records on employees.[6] Thus, King has referred Turner at one rate, but Palmour (who handles the referrals when King is out of the office) referred her at an even higher rate on a subsequent job.

Turner's job referrals through Local 53 are as follows:

Date	*Rate*	*Classif.*	*Employer*	*Job*	*Constr. or Maint.*
1-16-79	$ 7.15	Apprentice (3d yr)	Anco	Exxon	M
5-23-80	$ 8.10	Apprentice (3d yr)	Anco	Exxon	M

[3] Counsel for the General Counsel has filed a post-hearing motion, dated February 24, 1982, in which he requests that the copy of the "blue" book marked as (G.C. Exh. 2) covering the period of September 1, 1977, to September 1, 1980, be removed from the General Counsel's exhibit folder inasmuch as such document was not identified or introduced into evidence. As a copy of the "blue" book was identified and received as (Resp. Exh. 1), and as a form note of the reporter indicates that no copy of (Resp. Exh. 1) was furnished, I have removed the "blue" book copy from the General Counsel's exhibits, redesignated it as Resp. Exh. 1(a), and have placed it in the folder for Respondent's exhibits. I also have taken the blue book copy for the period of June 30, 1980, to September 1, 1982, furnished by counsel for the General Counsel with his motion, designated it as (Resp. Exh. 1(b)), and inserted it in the folder for Respondent's exhibits.

Counsel for the General Counsel also moves that his exhibits 2(a) through (e) be so marked. The reporter did so mark the exhibits contained in the folder of the General Counsel's exhibits.

[4] The construction agreement, known as the "blue" book (Resp. Exhs. 1(a) and (b)), sets forth hiring hall details. The hiring hall classifies mechanics and apprentices in three groups each based on their hours of work experience in the jurisdiction of Local 53. The entry level for a journeyman mechanic is group III, or at least 6,000 hours of work (usually described as 5 years of 1,200 hours each) in the jurisdiction of Local 53. Group III for the apprentices is employees who have never been referred by Local 53. Group II apprentices are employees who are neither mechanics nor apprentices. The classification, thus, is a misnomer in the contract. In practice, group II employees are called improvers. Formerly they were called permit people. They are employees who previously have been referred through Local 53, but are not in the formal apprenticeship program and do not have enough hours to be classified as mechanics. Charging Party Turner is an improver. She is not a member of Local 53 and she is not enrolled in the apprenticeship program.

The maintenance contract, known as the "orange" book (G.C. Exh. 3), just sets up two groups, mechanics and apprentices (and improvers).

[5] Under the construction agreement, *improvers* are to receive 50 percent of the mechanic's rate for their first year and 1,200 hours; 60 percent second year; 70 percent third year; and 80 percent fourth year. Beginning June 30, 1980, *apprentices* are paid at 55 percent for the first year; 65 percent for the second year; 75 percent for the third year; and 85 percent for the fourth year. Moreover, an apprentice can receive merit pay of an additional 5 percent. Business Agent King testified that, under the maintenance contract, the wage rate percentage increases by 5 percent every 6 months for the apprentices (G.C. Exh. 5).

[6] Respondent's main office is located in New Orleans. Baton Rouge is a branch office.

Date	*Rate*	*Classif.*	*Employer*	*Job*	*Constr. or Maint.*
8–14–80	$10.80	Mechanic	Anco	Exxon	M
9–9–80	7.605	Apprentice (2d yr)	Anco	B.F. Goodrich	C
	8.775	Apprentice (3d yr)			
	8.19	Improver (3d yr)			
1–7–81	$5.85	Improver (1st yr)	ICI	Wyandotte	C

As the foregoing chart reflects, Turner started high—at the third year (sixth 6 months) apprentice rate rather than at the first year improver rate of $4.77 (G.C. Exh. 4). Stated differently, she started at the 75-percent level (75 percent of the mechanic rate of $9.53) rather than at the 50-percent level.[7] The referral slip discloses that the office secretary, Joyce Palmour (then Joyce Muslin), actually referred Turner. Palmour so testified.[8]

When asked on direct examination why Turner was referred at the higher rate of $8.10 in May 1980,[9] King testified:

> All right. In the same turn, Miss Turner is a very good worker. Anywhere she worked, there's never been a complaint on her work. She has a good attitude toward work and is very capable. She is a good worker. . . . She came back in the hall with good reports. . . . To be compatible, you don't normally cut an individual's wages once they've been referred. You want to give them more money.

Turner reached the top on August 14 when King himself referred her at the full $10.80 rate of a mechanic (G.C. Exhs. 2(c) and (5)). King explained that he referred her at the mechanic rate because of a manpower shortage, Turner's good work record, and "I knew Miss Turner would go out there and make a good helper, would perform the work and therefore, I could get her in there for $10.80, so I did."

I credit Turner's testimony that she in fact performed mechanic's work by installing insulation on tracer lines.

Secretary Palmour gave Turner the fourth referral at the hourly rate of $7.605 under the *construction* agreement. Palmour testified that on that September occasion she thought she was referring Turner at the second year improver rate, and she marked Turner down for the $7.605 rate because she thought Turner had enough qualifying hours.[10]

The September referral, as shown in the chart above, was to Anco at the B. F. Goodrich jobsite where she worked until December 10, when she and LaFon Guichet Kenyon were fired for fighting on the job. Events at that jobsite gave rise to other events which precipitated this case.

Percy Barrient was Anco's general foreman on the B. F. Goodrich job. Barrient apparently thought well of Turner's work, because, when she asked him for a raise, he had her pay rate increased to $8.775.[11] Dissension was created on the job when others learned that Turner was earning more, and Turner admits that on October 14 Barrient told her he was reducing her pay because of her "big mouth." The pay reduction to $8.19 became effective on October 22. Even with that reduction, Turner still enjoyed a third-year improver's rate of $8.19.

At the hearing Turner explained that, regardless of how she got the $8.775, once she began receiving it and was performing her assigned job duties, she felt that her pay should have remained at the $8.775 level.[12] With that philosophy in mind, Turner first contacted job steward Henry Aucoin who told her that Anco could not cut her pay and that she should call Business Agent Cecil King. This Turner did the same day of Barrient's October 14 notice to her.

About 7 p.m., on October 14, Turner telephoned King at his home. According to Turner, King told her, "Office hours are 9:00 to 5:00." When she said she would talk to him later, he said, "No. What is your problem?" After Turner described the pay reduction matter, King responded that her problem lay with Barrient, and that, since she was getting "technical," King was not going to get involved because Barrient had too much influence with Anco. King added that he had enough problems with his book men [members] without having to worry about his permit people.[13] On October 22, job steward

[7] The construction agreement rates do not include an additional sum of approximately $2 per hour for health, welfare, and vacation fringe benefit payments made by the employer. In contrast, the rates shown for the maintenance contract are gross amounts from which contributions to these funds are *deducted*. Consequently, construction rates are significantly higher than maintenance rates.

[8] Palmour testified that Turner was referred as an improver. One box on the referral slip covers both apprentices and improvers (G.C. Exh. 2(a)). Although this "Apprentice/Improver" box is checked, the rate of $7.15 matches the pay rate for a third-year apprentice and not any improver rate (G.C. Exh. 4). King testified that it was the "fixed" rate for improvers. On subsequent referrals, King and Palmour underlined either apprentice or improver in order to clarify Turner's referral status.

[9] A new rate schedule went into effect with the orange book for the period of May 5, 1980, to May 1, 1981 (G.C. Exh. 5). The most recent rate scheduled under the construction agreement covers the period of June 30, 1980, to September 1, 1982.

[10] Palmour testified that at that time all (referral) records were maintained at the New Orleans office. Beginning in February 1981, Palmour explained, the Baton Rouge branch office began keeping such records. It was around that time, or possibly as late as April 1981, that King instructed Palmour to refer apprentices/improvers at their correct rates.

The referral slip (G.C. Exh. 2(d)) bears out Palmour's testimony, for the *improver* classification is underlined. However, the $7.605 rate was that of a second year *apprentice*, for it is 65 percent of the September 1980 mechanic rate of $11.70.

[11] It was a 10-percent-pay increase, advancing Turner two 6-month steps on the apprentice scale to the sixth 6-month level of a third-year apprentice. Of course, Turner was not in the apprentice program.

[12] Turner testified that she did not realize she was getting apprentice rates. She can be excused for this confusion, for it is clear that office secretary Joyce Palmour was unable to keep the rate distinctions straight in her own mind, as her testimony and the referral slips disclose.

[13] While King's member-nonmember remark is not alleged as being violative of Sec. 8(b)(1)(A) of the Act, complaint pars. 8 and 9 allege that on October 14 Respondent refused to accept and process Turner's grievance "for reasons which are unfair, arbitrary, invidious, and handled Turner's complaint in a perfunctory manner thereby breaching the fidu-

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Aucoin told Turner that Anco could cut her pay. Turner's pay remained at the $8.19 level the balance of the time she was on the job.

In his testimony King denied that he referred to book men and permit people, and asserted that both members and nonmembers feel free to call him at home on weekends. Moments later, on recross-examination, however, King seemed to flip-flop, for he conceded that he probably told Turner, as he tells everyone who calls him, that he works from 7 a.m. to 4:30 p.m. every day, that he is available at work, and that he is off in the evening and on his own time. He further testified that he told Turner he would check on her complaint, and that he did in fact talk to Barrient the next day or so.

I credit Turner's version of her October 14 telephone conversation with King. However, I credit King's testimony that he did confer with Barrient on the matter but concluded, with some reason, that a grievance would be inappropriate.[14] Accordingly, I shall dismiss complaint paragraphs 8 and 9.

2. King's threats—and a barroom brawl at The Rack

There is an establishment in Baton Rouge known as The Rack. There the locals may gather to quench their thirst at the bar, dance, shoot pool, or fire electronic lasers at Buck Rogers' types on video screens.

While on his vacation, on the afternoon of November 28, King stopped in at The Rack to enjoy some product of the brewer's art. A few Local 53 members, including Larry J. Ourso, Sr., later joined him at the bar. After a time, Ourso telephoned Turner at their apartment and invited her to join him. Several minutes later, around 7:30 p.m., Turner arrived and sat to Ourso's right at the bar.[15] At Ourso's left sat King, and on his left sat Local 53 member Robert Reid. King's secretary, Joyce Palmour, was several feet away either playing pool or seated at a table with her mother and stepfather.

Turner immediately began chastising Ourso for being out drinking rather than being home with her. In the process of her inartful persuasion, Turner remarked that all men were alike in this respect. King took issue at that and ungraciously told Turner that if she were his wife, he would displace her teeth. Turner then described King as being a hyphenated obscenity. King replied in kind, stepped around Ourso, pulled Turner's hair, and labeled her as being a member of the world's oldest profession. Ourso told the two to restrain themselves, and King resumed his place at the bar. As King resumed his seat, Turner belittled his value as a business agent with the remark that "some B.A. you are." She added that King should have investigated her pay cut by Anco on the B. F. Goodrich job. King responded by saying Turner would not work out of the hall again. She told King he could not refuse to refer her if she signed the out-of-work register. King then told her that, if he did refer her, it would be at the lowest pay rate of $5 "something" an hour.[16] King then left the bar and joined his secretary's group several feet away.[17]

Moments later Ourso walked over to talk with King. While Ourso testified that he did so because King was standing there talking loud and acting as if he were the "bull of the woods,"[18] I need not resolve the exact sequence of how round two began. Suffice it to say, as Ourso and King began to talk, Turner went over to them. The Turner-Ourso version is that as Turner and Palmour were attempting to persuade the two men to cool it, the two women got into a fist slugging brawl with Palmour beating Turner in the face while the former's friends held Turner.

The King-Palmour group of witnesses have Turner coming up from behind King, reaching around with her hands, and clawing his face so deeply that the blood flowed. At that point, Palmour jumped on Turner and pummeled her without any assistance.

The gendarmes soon arrived, order was restored, and the rowdies went their separate ways. It is not necessary that I resolve the disputed testimony about the barroom brawl at The Rack in order to resolve the issues in this case.

3. Business Manager Schneider investigates

As earlier noted, Turner and LaFon Kenyon both were fired from the B. F. Goodrich jobsite on December 10. While the General Counsel does not allege that Respondent unlawfully failed to represent Turner in any way concerning that termination, the discharge apparently prompted Turner to visit Business Manager Kenneth Schneider (King's superior) at his New Orleans office where she complained to him about the October 22 pay rate reduction, King's November 28 threats at The Rack,

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ciary duty owed the employees whom it represents." As the remark was litigated, I shall make findings regarding it.

[14] It appears that the Union would have been in a rather weak posture in a grievance proceeding, for Turner obviously was being overpaid under the terms of the contract. And a grievance could have resulted in a pay reduction for any other helpers receiving inflated rates. Local 53 was not required to proceed in a manner which would have all helpers receive only the contract rates just because one helper, Turner, became the focus of attention. The situation would be different if Local 53 filed grievances for other helpers in such a situation but refused to do so for Turner.

[15] There is some question as to whether Turner initially went to the far end of the bar, ordered a drink, and conversed briefly with a barmaid. Resolution of these details is unnecessary.

[16] Turner did not recall the penny amount over $5, nor did she specify the penny amount at p. 8 of her own undated 15-page pretrial statement received at the Board's New Orleans office on January 5, 1981 (Resp. Exh. 6). However, at p. 5 of her January 20, 1981, Board affidavit (Resp. Exh. 5), she quotes King as using the figure of $5.85. Turner conceded on cross-examination that her memory was refreshed upon seeing the $5.85 figure on the January 7, 1981, referral slip to ICI. Under the "blue" contract, $5.85 was the lowest scale, being 50 percent of the mechanic's rate of $11.70 (G.C. Exh. 2). However, an even lower rate prevailed under the "orange," or maintenance, agreement with 50 percent of the $10.80 mechanic's rate being $5.40 (G.C. Exh. 5). In any event, whether King said $5.85 or $5.40 is not material in view of the findings I make.

Complaint par. 10 alleges the foregoing threats as violations of Sec. 8(b)(1)(A) of the Act.

[17] While the foregoing account generally credits the testimony of Turner and Ourso, it also is a synthesis of their testimony and that of King, Reid, Palmour, and a barmaid, Gerrie Cotten. While King and others deny the job discrimination threat, I specifically credit Turner and Ourso and find that it was made. Thus, I find that Respondent violated Sec. 8(b)(1)(A) of the Act as alleged in complaint par. 10. It should be noted that Ourso and Turner ceased being on intimate terms some 6 months before the instant hearing.

[18] The transcript erroneously reflects "full of the woods."

and her December 10 discharge. She told Schneider that she was to the point of getting the Labor Board involved because no one was helping her. Schneider took notes as Turner spoke, and he told her he would investigate and call her the following night.[19] When Schneider did not call her after several days, Turner contacted Region 15 of the Board.[20] Thereafter, the Regional Office assigned Field Examiner Janice C. Hankins to interview Turner for prefiling assistance. Hankins met Turner in Baton Rouge. This apparently was on December 30, for that is when Turner *signed* her original charge, although the charge itself was not *filed* until January 5, 1981.[21] The return receipt (G.C. Exh. 1(b)) reflects that Joyce Palmour (King's secretary) signed as receiving the charge on January 7, 1981. By coincidence, Local 53 referred Turner to ICI at $5.85 per hour the very same day.

In the meantime, Schneider was conducting his investigation. He testified that he went to the B. F. Goodrich jobsite, about 70 miles from New Orleans, and spoke with Percy Barrient. He also conferred with King and J. C. Petrie.[22] Schneider concluded that Turner's rate reduction was not contractually improper, that B. F. Goodrich followed industry practice by firing both Kenyon and Turner when they got into a fight on December 10,[23] and that he could not unscramble the November 28 events at The Rack because of all the conflicting testimony.

Schneider testified that it took him 8 to 10 trips to investigate the entire matter over a 3- to 4-week period, and that it took a week or two to get his letter-report (just over two single-spaced pages) to Turner typed. Schneider concludes his report as follows:

> In conclusion, through the maze of allegations, complaints and conflicting testimony it is clear to me that you are still working, you have not been denied access to our referral list and I can assure you that you will not be denied fair treatment in the future. On the basis of those findings I feel that the allegations you presented to me in December of 1980 are unsubstantiated by the evidence and therefore no further action will be taken at this time.

In his report Schneider also informed Turner that he had instructed King to be sure:

> [T]hat in the future no one is sent out of our hall at any wage rate higher than our negotiated contract wage rate. Also, I have informed him to make sure there is no discrimination in job referral towards you because of [Turner's] complaint.[24]

C. *Whether King's Threat Was Implemented*

1. General Counsel's *prima facie* case

I find that the General Counsel has established a *prima facie* case that Respondent implemented King's November 28 threat to refer Turner at the lowest contractual rate applicable. As ICI's Wyandotte job fell under the construction contract, the lowest rate was $5.85—exactly the rate at which King referred Turner. It is in stark contrast to the much higher rates she had been receiving.

The record contains evidence that Local 53 changed its *practice* from high rate referrals to contract rate referrals in the February to April 1981 period.[25] Aside from Schneider's February 4, 1981, letter to Turner reporting that he had advised King to make sure that referrals from the hall are at the contractual rates, there is Palmour's testimony that it was not until February 1981 when the records for those referred (presumably members and others living in the Baton Rouge area) were transferred from New Orleans to Baton Rouge. As already noted, Palmour further testified that the first time King told her to refer employees at their proper rates was in April 1981.[26] Finally, as Local 53 member Larry Ourso explained on cross-examination, the practice changed because in January through February 1981 the

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[19] Turner initially testified that Schneider said he would investigate and "let me know." This conforms to the addendum to her affidavit of January 20, 1981 (Resp. Exh. 5). On cross-examination Turner asserted that Schneider said he would call her the following day/evening. Schneider was called out of order and testified first in order to accommodate his travel plans. Thus, he apparently was not available for rebuttal.

I find that Schneider promised to call Turner when he "found out," and that he did not say he would call her back the next day or evening. Even if Schneider thought he could handle the investigation telephonically from his office, it is highly unlikely he would have given himself only 1 day to conduct the investigation.

[20] In Turner's words:

> I was tired of being pushed around. . . . They didn't want to investigate. They didn't want to—it was like I was not—I was a nobody.

[21] Turner testified that Hankins took the signed charge back to New Orleans with her, and that she complied with Hankins' instructions to write out a statement of the events which she mailed to Hankins. As both the charge and Turner's undated 15-page letter are date-stamped at the same minute on January 5, 1981, it is clear that when Hankins received the letter, she filed the charge, date-stamping both at the same time. While this sequence is of no real significance, there was some confusion over it at the hearing. Turner's Board affidavit was given at the time she filed an amended charge later in January.

[22] Petrie had been one of those drinking at The Rack with King on November 28. When Turner entered The Rack on that occasion, Petrie left the bar and proceeded to the pool table. Although Petrie did not testify, Schneider testified that Petrie was a witness and that he checked with him about the events at The Rack.

[23] Although both Kenyon and Turner signed the out-of-work register, Kenyon was referred out first because, as an apprentice, she is in group I which is exhausted before Turner's group II. By letter dated December 17, Anco notified Local 53 that neither Kenyon nor Turner was eligible for rehire at the project because of their fighting on the job (Resp. Exh. 4). Apparently before everyone at Anco had that message, and before Local 53 received the letter, the Union referred Kenyon back to the job. Schneider testified that he did not suggest to Anco that Kenyon be transferred after the above letter was received by Local 53, but that Anco transferred her off the jobsite. The letter arrived before Turner's name came up for referral; therefore, she could not be returned to Anco's B. F. Goodrich project.

[24] I find that this instruction was issued to King at or about the time Schneider's letter-report was being typed, and not in the December to early January 1981 period.

[25] Although Schneider, p. 2 of his February 4, 1981, letter to Turner, asserts that it is the *policy* of Local 53 to refer only at the applicable contract rates, it is clear from the testimony of King and Palmour that in *practice* Local 53 made every effort to refer at much higher rates than the experience (accumulated hours) of the improvers and apprentices justified. I do not credit King and Palmour when they suggest that the higher rate referrals were mistakes.

[26] As the month of April was used by counsel for the General Counsel in his question, I interpret Palmour's affirmative answer to be more in the nature of a reference to the February-April time frame rather than a positive fixing of the month of King's instruction.

members of Local 53 insisted that the improvers and apprentices be referred at their correct wage rates.

2. Conclusion

I find that Respondent referred Turner at the lowest possible rate on January 7, 1981, in order to implement King's November 28 threat. Moreover, I draw an adverse inference from Respondent's failure to produce its records.[27] The inference I draw is that the records, if produced, would show that improvers and apprentices other than Turner were referred in January at rates higher than appropriate for the number of hours they had accumulated. Accordingly, I find that Local 53 violated Section 8(b)(1)(A) of the Act by referring Turner at $5.85 for discriminatory reasons.[28]

CONCLUSIONS OF LAW

1. Anco Insulations, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Insul-Contractors, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. International Association of Heat and Frost Insulators and Asbestos Workers Local No. 53 is a labor organization within the meaning of Section 2(5) of the Act.

4. By telling employee Betty Ruth Turner that it would not process a grievance on her behalf because she was not a member of Local 53, Respondent violated Section 8(b)(1)(A) of the Act.

5. By threatening not to refer Betty Ruth Turner, or to refer her at the lowest possible pay rate, because Turner criticized Respondent's failure to process her grievance over a pay matter, Respondent violated Section 8(b)(1)(A) of the Act.

6. By discriminatorily referring Betty Ruth Turner on January 7, 1981, at the lowest possible wage scale, Respondent violated Section 8(b)(1)(A) of the Act.

7. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent did not unlawfully fail to represent Betty Ruth Turner with respect to her October 1980 pay rate grievance.

THE REMEDY

Having found that Local 53 has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Because I have found that Respondent unlawfully referred Betty Ruth Turner at the lowest possible wage rate on January 7, 1981, I shall order that it not refer her at discriminatory rates in the future and that it make Turner whole for the loss of earnings that she suffered by reason of the discrimination against her. As the record reflects that Turner was referred at the $7.605 rate in her previous referral under the construction agreement,[29] I find that she would have been referred at no less than that rate to ICI on January 7, 1981, absent the discrimination against her.[30] The amount of backpay due, if any,[31] shall be determined at the compliance stage in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Interest shall be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[32]

The Respondent, International Association of Heat and Frost Insulators and Asbestos Workers Local No. 53, Baton Rouge, Louisiana, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Telling employees that it will not process grievances on their behalf because they are not members of Local 53.

(b) Threatening employees not to refer them, or to refer them at the lowest possible contractual rates, be-

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[27] At the hearing Respondent refused to comply with the General Counsel's *subpoena duces tecum* calling for the production of records which would show referrals, hours credited, etc. (G.C. Exh. 9.) Although counsel for the General Counsel announced that he would not seek enforcement of the subpeona, such is not required. *Hedison Manufacturing Company* v. *N.L.R.B.*, 643 F.2d 32 (1st Cir. 1981), enfg. 249 NLRB 791 (1980). Contra: *N.L.R.B.* v. *International Medication Systems, Ltd.*, 640 F.2d 1110 (9th Cir. 1981). In any event, the General Counsel established a *prima facie* case of discriminatory referral without the need of an adverse inference, and it was Respondent's burden to go forward and produce evidence which would rebut the General Counsel's *prima facie* case. This Respondent failed to do.

The complaint issued on February 27, 1981, with the notice of hearing set for January 13, 1982 (nearly a year later), which is the date the matter was heard. The Region did not utilize a precomplaint *subpoena duces tecum* to Local 53 as part of the Region's investigation of Turner's charge. The courts long ago enforced the General Counsel's utilization of statutory *subpoenas duces tecum* as part of the investigation of charges. *N.L.R.B.* v. *United Aircraft Corporation (Pratt & Whitney Division and Hamilton Standard Division, et al.)*, 300 F.2d 442 (2d Cir. 1962); *N.L.R.B.* v. *Anchor Rome Mills*, 197 F.2d 447 (5th Cir. 1952). Conceivably, had the Region, pursuant to its authority under Sec. 11 of the Act, utilized an investigative *subpoena duces tecum*, an early settlement of the case could have been effected—thereby conserving both time and agency funds.

[28] Although the complaint alleges only that Respondent's discriminatory referral of Turner violates Sec. 8(b)(1)(A) of the Act, such conduct of Local 53 also violates Sec. 8(b)(2) of the Act. *Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO (S & M Electric Co.)*, 223 NLRB 1499 (1976), enfd. 559 F.2d 1208 (3d Cir. 1977).

[29] To Anco at the B. F. Goodrich jobsite. As earlier noted, construction agreement pay rates, such as $7.605, do not include an additional sum of about $2 an hour for employer contributions to health, welfare, and vacation funds.

[30] The General Counsel, in effect, seeks, by allegation in complaint par. 12 and by argument on brief, an 8(b)(2) make-whole remedy for the 8(b)(1)(A) violation.

[31] Theoretically, Turner could have had high interim earnings somewhere during the calendar quarter which would offset her loss.

[32] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

cause they criticize Respondent's handling of contractually related grievances.

(c) Discriminatorily referring employees at pay rates lower than that at which Respondent normally would refer employees.

(d) In any like or related manner restraining, coercing, or discriminating against employees of ICI, or any other employer, in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Make whole Betty Ruth Turner for any loss of earnings she may have suffered as a result of the unlawful discrimination against her in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, referral and accumulated hours records, out-of-work registers, pension and welfare report records, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Baton Rouge, Louisiana office, and in its meeting hall there, and other places where it customarily posts notices, copies of the attached notice marked "Appendix."[33] Copies of said notice, on forms provided by the Regional Director for Region 15, shall, after being duly signed and dated by an authorized representative of Local 53, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members of Respondent are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 15 signed and dated copies of the notice for posting by ICI, if willing, in places where notices to its employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, and after being signed and dated by an official representative of Local 53, shall be returned forthwith to the Regional Director for disposition by him.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations not found herein.

[33] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT do anything which restrains or coerces employees with respect to these rights.

WE WILL NOT tell employees that we will process their grievances because they are not members of Local 53.

WE WILL NOT threaten not to refer employees, or to refer them at the lowest possible contract pay rate, because they have criticized the way we have handled their grievances.

WE WILL NOT refer employees at pay rates lower than rates at which we ordinarily would refer such employees under circumstances which reflect an unlawful motivation behind the referrals at such lower pay rates.

WE WILL NOT in any like or related manner restrain or coerce employees of Insul-Contractors, Inc., or any other employer, in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make Betty Turner whole, with interest, for any loss of earnings she may have suffered as a result of our referring her on January 7, 1981, at a pay rate which was unlawfully low.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS LOCAL NO. 53